(1)

86- 12

No.

Supreme Court, U.S.
FILED
JUL 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DOUGLAS ESPOSITO and BARBARA P. ESPOSITO,

Petitioners,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THOMAS J. CARLEY
Counsel for Petitioners
159 Princeton Road
Rockville Centre, New York 11570
(516) 766-2489

36pp

QUESTIONS PRESENTED

1. Does our Constitution empower Congress to impose a direct or indirect tax or taxes on PERSONS?

2. Does Subtitle A of the Internal Revenue Code impose any tax on PERSONS or any tax on INCOMES or any Taxes, Duties, Imposts or Excises?

3. When the Commissioner admits in Tax Court pleadings that no "deductions from gross income" were claimed by petitioners, may the Commissioner or anyone impose a tax on PERSONS by disallowing "deductions from gross income"?

PARTIES TO THE PROCEEDING

The parties before this Court are solely those listed and set forth in the caption of this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
Underlying Facts, Proceeding Below And Constitutional Significance Of The Case	3
REASONS FOR GRANTING THE WRIT	7
This Court Should Summarily Reverse The Decision Below Because it Is Undisputed And Admitted By All That The Factual Foundation For The Decisions Below Is Erroneous In Every Material Respect	7
The Court Should Address The Constitutional Question Whether There Is Any Constitutional Foundation For Subtitle A Of The Code	9
A. It Is Conceded By All That There Are No TAXES Imposed By Subtitle A Of The Code	11
B. It Is Conceded By All That There Are No EXCISES Imposed By Subtitle A Of The Code	11
C. It Is Conceded By All That There Are No Impositions In Subtitle A Of The Code On INCOMES	12

Page

D. It Is Conceded By All That Congress Has No Constitutional Power To Tax PERSONS And That Congress Has Not Enacted Any Law Laying Any Impositions On PERSONS in Subtitle A Of The Code 13

E. It Is Conceded By All That Congress Has Not Exercised Any Of Its Constitutional Powers In Subtitle A Of The Code 14

CONCLUSION 15

APPENDIX A

Opinion Of The United States Court Of Appeals For The Fourth Circuit A-1

APPENDIX B

Tax Court Order Of Dismissal and Decision A-8

APPENDIX C

Tax Court Order Concerning Motion For Continuance And To Change Place Of Trial A-9

APPENDIX D

Petitioners' Tax Court Petition Allegations Which Have Been Admitted By Respondent In His Tax Court Answer In This Case A-10

APPENDIX E

Questions Presented To The United States Court Of Appeals For The Fourth Circuit On Appeal From The Decision Of The United States Tax Court A-11

TABLE OF AUTHORITIES

Cases	Page
Bowers v. Taft, 20 F.2d 561 (2nd Cir. 1927)	13
Brushaber v. Union Pacific Railroad Company, 240 U.S. 1 (1916)	12
Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895)	13,14
Stanton v. Baltic Mining Company, 240 U.S. 103 (1916)	12
Taft v. Bowers, 278 U.S. 470 (1929)	13
Constitutional Provisions	
U.S. Const. Art. I, §2, cl. 3	2,11
U.S. Const. Art. I, §8, cl. 1	2,11
U.S. Const. Art. I, §9, cl. 4	2,11
U.S. Const. Sixteenth Amendment	2,7,10,12,13
Statutes	
26 U.S.C. §62	2,7,8
26 U.S.C. §6213(a)	3
26 U.S.C. §7482	6
28 U.S.C. §1254(1)	1

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DOUGLAS ESPOSITO and BARBARA P. ESPOSITO,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Douglas Esposito and Barbara P. Esposito ("Espositos") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, infra, A-1 to A-7) is unpublished. The Tax Court did not write an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States (hereafter Constitution) provides in relevant part:

Article I, Section 2, clause 3:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.

Article I, Section 8, clause 1:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . .; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Article I, Section 9, clause 4:

> No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Sixteenth Amendment:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The Internal Revenue Code of 1954 (26 U.S.C.) (hereafter Code) provides in relevant part:

§ 62. Adjusted gross income defined

> For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions: . . .

STATEMENT OF THE CASE

Underlying Facts, Proceedings Below And Constitutional Significance Of The Case

The Espositos filed a 1980 Form 1040 federal income tax return declaring their gross income to be $17,468.00, claimed no adjustments to income, did not itemize deductions, and declared their adjusted gross income to be the same $17,468.00. (Admitted by Commissioner in Tax Court Pleading - See Appendix D, infra, A-10)

The "Respondent disallowed various amounts aggregating $35,859.00 as not deductible from gross income." (Admitted by Commissioner in Tax Court Pleadings - See Appendix D, infra, A-10)

Based on the $35,859.00 "disallowance", the Commissioner sent the Espositos a notice advising the Espositos of a deficiency in their Subtitle A [1] income tax of $12,713.23 and Subtitle F addition-to-tax penalties of $1,169.69 under 26 U.S.C. §6651(a)(1) and $722.41 under 26 U.S.C. §6653(a).

The Espositos timely filed a pro-se petition with the Tax Court, invoking jurisdiction under 26 U.S.C. §6213(a), in which they raised the following 6 points or arguments, all of which points or arguments were admitted by the Commissioner in his pleadings when the Commissioner filed his answer to the petition in Tax Court (See Appendix D, infra, A-10):

1. On their 1980 income tax return filed, petitioners declared their gross income to be $17,468.00

2. On their 1980 income tax return filed, petitioners claimed no adjustments to income and declared their adjusted gross income to be $17,468.00.

---

[1] Subtitle A of the Code (Subtitle A) consists of all sections of the Code numbered below §2000.

3. Respondent disallowed various amounts aggregating $35,859.00 as not deductible from gross income.

4. On their 1980 income tax return filed, petitioners did not itemize deductions.

5. A penalty under Section 6651(a) (1) cannot be imposed where there is no underpayment of income tax.

6. A penalty under Section 6653(a) cannot be imposed where there is no underpayment of income tax.[2]

The Commissioner having thus admitted and conceded in his Tax Court pleadings that Section 6651(a) (1) and Section 6653(a) Subtitle F penalties cannot be applied if there was no underpayment of tax by the Espositos, we have simplified the issues in this case. If the Espositos are not properly charged with underpayment of a Subtitle A income tax, the Subtitle F penalties automatically are also invalid. That being so, the basic question in this case is whether the Espositos really owe or could possibly owe the $12,713.23 tax asserted against them under Subtitle A of the Code, our Constitution or under the admitted facts of this case.

After filing their pro-se Tax Court petition, the Espositos moved from North Carolina to Florida. On Sept. 12, 1984 the Tax Court sent a notice to the Espositos in Florida concerning trial in North Carolina, and the Espositos made a motion in the Tax Court on Oct. 9, 1984 for a continuance and for a change in the place of

---

[2] In their pro se Tax Court petition, the Espositos raised also the following points or arguments, which were denied by the Commissioner in his pleadings when the Commissioner filed his answer to the Tax Court petition:

5.k. Congress imposed no income tax on petitioners for the year 1980.

5.l. There is no authority granted to Congress to impose an income tax on petitioners in or for the year 1980.

5.m. There is no authority granted to Congress to impose any tax on petitioners in or for the year 1980.

trial to Tampa, Florida. The Tax Court did not act on this motion to change the place of trial to Florida and left the case on the Winston-Salem, North Carolina calendar without deciding the motion or directly notifying the Espositos or taking any "further action as is appropriate in regard to petitioners' motion" as the Tax Court Order of Oct. 15, 1984 (Appendix C, infra, A-9) stated and led petitioners to believe to be forthcoming from the Tax Court. The Espositos failed to appear physically in Winston-Salem on the November 26, 1984 calendar call. The only representation of the Espositos in Tax Court at that Nov. 26, 1984 calendar call was their pro-se Tax Court petition and the factual allegations of that petition which were admitted by the Commissioner on the merits (A-10) – that the Commissioner claimed a Subtitle A tax was due from the Espositos based on the Commissioner's *disallowance of deductions which had never been claimed by the Espositos.*

While still waiting in Florida for the anticipated Tax Court's "further action as is appropriate in regard to petitioners' motion" (A-9) of Oct. 9, 1984 for continuance and change of place of trial to Tampa, Florida, the Espositos received by mail on Dec. 24, 1984 a copy of the Tax Court's Dec. 20, 1984 Order Of Dismissal and Decision (Appendix B, infra, A-8).

The Tax Court decided, with the pro-se petitioners absent, to ignore the Tax Court pleadings where the Commissioner admitted he disallowed $35,859.00 deductions from gross income *which had never been claimed by petitioners* (A-10). And in the same breath the Tax Court decided there was $12,713.23 tax due from petitioners (Appendix B, infra, A-8) even though everyone, including the Commissioner, concedes Congress never imposed any such tax on the individual persons who are the petitioners in this case, and further concedes that Congress has no authority granted by our Constitution to impose taxes on persons.

Deductions never claimed were disallowed (A-10) and a tax never imposed by Congress was decided to be due from these persons (A-8) – and all of this even though the Constitution never empowered Congress to impose taxes on persons. All of this is conceded by respondent.

On Jan. 15, 1985 the Espositos filed a Tax Court motion to vacate or revise the Tax Court decision entered Dec. 20, 1984, which motion was denied Jan. 23, 1985 by the Tax Court.

On April 22, 1985 the Espositos timely appealed the Tax Court decision to the United States Court of Appeals for the Fourth Circuit, invoking jurisdiction under 26 U.S.C. §7482.

On the appeal to the Fourth Circuit the Espositos showed clearly and in detail that the Tax Court abused its discretion in dismissing the case and entering Judgment against the Espositos for the Taxable Year 1980, even though the admitted Tax Court pleadings (A-10), law and Constitution required a holding for the Espositos. This showing was so overwhelming that the Commissioner did not controvert any part of the Espositos' brief and the points and analysis shown in that Fourth Circuit brief. The Tax Court's order dismissing the Espositos' case and entering judgment against the Espositos for the Taxable Year 1980 was clearly shown to be an abuse of discretion, incorrect as a matter of law, Constitutional law, as well as fact, and this is wholly undisputed and conceded by the Commissioner in his Fourth Circuit brief in this case.

The Fourth Circuit elected in its opinion to omit the admitted facts and issues in this case. Rather than dilute this petition for certiorari with an endless litany of error and omission, we will limit ourselves at this juncture to the following very serious misstatements in the Fourth Circuit's opinion which cannot be justified by anything in the record in this case.

Contrary to what is written in the Fourth Circuit's opinion (A-2), the Espositos have never claimed, and do not now claim, that the $35,859.00 "disallowed" by the Commissioner in this case should have been allowed. The Tax Court pleadings admitted by the Commissioner (A-10) show conclusively that the Espositos never claimed any such deductions on their return.

Also contrary to what is written in the Fourth Circuit's opinion, the Espositos never claimed or argued "that Congress has no authority to impose a tax on income" (A-2) and never claimed or argued that "the federal income tax is unconstitutional."

(A-4). *Precisely the opposite is true.* The Espositos insist at every turn that Congress does "have power to lay and collect taxes on incomes"; the Espositos insist that this is the power conferred on Congress by the Sixteenth Amendment to our Constitution.

The Espositos in their Fourth Circuit brief set forth such strong analyses and argumentation that the Commissioner could not and did not controvert any of the separate reasons showing abuse of discretion and error by the Tax Court. Rather than permit or invite any possible misunderstanding of the Espositos' clear analysis and argumentation, the Espositos presented 13 very precise and relevant questions (Appendix E, infra, A-11 et seq.), each of which is remarkably easy to answer and each of which the Fourth Circuit specifically declined to disclose, state, or answer in its opinion; in the words of the Fourth Circuit: "We decline to do so." (A-4).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW BECAUSE IT IS UNDISPUTED AND ADMITTED BY ALL THAT THE FACTUAL FOUNDATION FOR THE DECISIONS BELOW IS ERRONEOUS IN EVERY MATERIAL RESPECT.

The pleadings in the Tax Court clearly show that respondent claims petitioners owe tax based upon respondent's disallowance of deductions which were never claimed by petitioners.

It is admitted by all that petitioners declared their gross income to be $17,468.00 and declared their adjusted gross income also to be $17,468.00. (Appendix D, infra, A-10).

Adjusted gross income is a statutory term and can never be greater than gross income, which is also a statutory term, but can be less than gross income *only* if deductions are claimed from gross income in order to arrive at a lower adjusted gross income. (Code §62, supra).

In a case such as this one, where it is admitted by all that gross income and adjusted gross income are precisely the same (A-10), as a matter of law (as well as common sense, mathematics and fact) gross income and adjusted gross income can *only* be the same when nothing is claimed as being deductible from gross income—as in this case. (See Code §62).

In spite of the fact admitted by respondent that petitioners made no claim whatever on their 1980 return to anything greater than zero being deductible from gross income (A-10), respondent admitted that "Respondent disallowed various amounts aggregating $35,859.00 as not deductible from gross income" (Appendix D, infra, A-10).

Based on this disallowance of $35,859.00 "as not deductible from gross income", respondent claims the petitioners owe tax even though it is admitted at every turn that petitioners made no claim on their 1980 return filed to any amount whatever as deductible from gross income (A-10).

This disallowance of $35,859.00 more than was claimed is irrational and illegal. No one has any discretion to act irrationally or illegally; it breeds contempt for those who act thusly. The decisions below should be reversed summarily.

If the foregoing were not so conclusive on the fact that petitioners claimed no deductions, the following admissions by respondent in the Tax Court pleadings must be conclusive (Appendix D, infra, A-10). It was specifically admitted by respondent that "petitioners claimed no adjustments to income" (A-10). "Adjustments to income" is Internal Revenue's terminology on the Forms 1040 it prints to revise "gross income" on a Form 1040 down to "adjusted gross income" by way of deductions permitted by Code §62 from gross income to arrive at adjusted gross income. With respondent's admission that petitioners claimed no adjustments (deductions from gross income), the disallowance of $35,859.00 more than was claimed is irrational and illegal. The decisions below should be reversed summarily.

Separate from the foregoing, respondent specifically also admitted in his Tax Court pleadings (Appendix D, infra, A-10) that "On their 1980 income tax return filed, petitioners did not itemize deductions" (A-10). What can be clearer? With respondent's additional, separate and third admission that petitioners did not itemize deductions, the disallowance of $35,859.00 deductions is irrational and illegal. The decisions below should be reversed summarily.

In three separate ways, respondent admits in the Tax Court pleadings (A-10) he disallowed deductions which were never claimed on the 1980 return filed by the Espositos. Disallowance of unclaimed and non-existant deductions cannot sustain the tax asserted against the Espositos in this case. The decisions below should be reversed summarily based on the facts admitted in the Tax Court pleadings in this case.

THIS COURT SHOULD ADDRESS THE CONSTITUTIONAL QUESTION WHETHER THERE IS ANY CONSTITUTIONAL FOUNDATION FOR SUBTITLE A OF THE CODE.

Contrary to uninformed speculation, Subtitle A of the Code does not impose any kind of tax on PERSONS and neither does it make any imposition on INCOMES. This is conceded by all.

It is also conceded by all that Subtitle A does not impose any Tax, Duty, Impost or Excise on any thing.

Simply stated, neither respondent nor the Courts below could discuss any of the 13 questions presented to the Fourth Circuit (Appendix E, infra, A-11, 12, 13) and could not find any provision of Subtitle A which had any Constitutional foundation whatever. Respondent conceded below on every point of law and Constitutional law raised by the petitioners in connection with these questions. To state and answer the questions presented below leads only to a rational and reasoned conclusion that Subtitle A of the Code contains no provisions whatever which have any foundation or support in our Constitution. In response to petitioners' reasonable request for the Fourth Circuit to state and

answer the 13 questions, the Fourth Circuit stated: "We decline to do so." (Appendix A, infra, A-4). The Fourth Circuit simply refused to state or answer any of the 13 questions (A-11, 12, 13) put by petitioners.

It is conceded by all that neither the Tax Court nor anyone else has any discretion or power at all at any time to impose or approve a tax on any person when Congress has not imposed a tax on any person or when Congress has not been empowered by our Constitution to impose a tax on any person.

It is conceded by all that Congress has power to lay and collect Taxes, Duties, Imposts and Excises (including those on Incomes).

It is conceded by all that Congress has not, in Subtitle A of the Code, imposed any Taxes, Duties or Imposts.

It is conceded by all that Congress has not, in Subtitle A of the Code, imposed any Excise on any thing whatever.

It is conceded by all that Congress has not been empowered by our Constitution to impose taxes on Persons.

It is also conceded by all that Congress has not, in Subtitle A of the Code, made any direct or indirect imposition on Persons whatever.

It is conceded by all that Congress, in Subtitle A of the Code, has made no impositions on "incomes", even though such an imposition would be clearly permitted by the Sixteenth Amendment. *The Sixteenth Amendment has never been utilized or implemented in Subtitle A at any time.* This is conceded by all.

The questions presented in this case have been thoroughly explored with respondent and the answers are clean-cut, definitive and summarized in the following points A through E.

A. *It Is Conceded By All That There Are No TAXES Imposed by Subtitle A Of The Code.*

It is conceded by all that there is no TAX imposed by Subtitle A which Constitutionally must be apportioned among the several States of this Union in compliance with Art. I, Sec. 2, cl. 3 and Art. I, Sec. 9, cl. 4 of our Constitution which provide in relevant part respectively:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.
>
> No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

These Constitutional provisions require that Taxes "Shall be apportioned among the several States". There is not one word or phrase in Subtitle A about any Subtitle A imposition being apportioned among the several States. Neither respondent nor the judges of the Fourth Circuit could find any tax imposed by Subtitle A to be apportioned among the several States. There is no such tax imposed in or by Subtitle A. This is conceded by all.

B. *It is Conceded By All That There Are No EXCISES Imposed By Subtitle A Of The Code.*

It is conceded by all that there is no EXCISE imposed by Subtitle A which is, and Constitutionally must be, uniform throughout the United States in compliance with Art. I, Sec. 8, cl. 1 of our Constitution, which provides in relevant part that "all Duties, Imposts and Excises shall be uniform throughout the United States." Neither respondent nor the judges of the Fourth Circuit could find any such EXCISE imposed by Subtitle A. There is no such EXCISE imposed in or by Subtitle A. This is conceded by all.

C. *It Is Conceded By All That There Are No Impositions In Subtitle A Of The Code On INCOMES.*

This Supreme Court has authoritatively and lucidly ruled and teaches that impositions on INCOMES are in their nature EXCISES and that EXCISES shall be uniform throughout the United States. *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1 (1916); *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916).

This Supreme Court teaches us in *Brushaber*, supra, at page 13:

> In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.

Thus this Court teaches that each of the two great classes of direct and indirect taxes is governed by its own Constitutional regulation and not by the other. Direct TAXES are governed by the rule of apportionment and not by the rule of uniformity. Duties, imposts and EXCISES (including those on INCOMES) are governed by the rule of uniformity and not by the rule of apportionment.

That Congress has power to lay EXCISES (indirect taxes in the Constitutional sense) on INCOMES in accord with the Constitutional regulation of uniformity throughout the United States is conceded by all.

That impositions on INCOMES are EXCISES and not subject to the regulation of apportionment among the several States is conceded by respondent and emphatically enunciated in the Sixteenth Amendment of our Constitution:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

But notwithstanding the clear 16th Amendment power of Congress to make impositions on INCOMES, it is conceded by all that *in the entirety of Subtitle A there are no impositions at all on INCOMES* as permitted by the 16th Amendment. Neither respondent nor the judges of the Fourth Circuit could find any such imposition; everyone concedes there is no such imposition in Subtitle A on INCOMES.

D. *It Is Conceded By All That Congress Has No Constitutional Power To Tax PERSONS And That Congress Has Not Enacted Any Law Laying Any Impositions On PERSONS In Subtitle A Of The Code.*

While Congress has Constitutional power to lay and collect Taxes, Duties, Imposts and Excises (including those on incomes), Congress has no Constitutional power to tax PERSONS and has not enacted any law or statute making any imposition on PERSONS in Subtitle A of the Code. This is conceded by all.

In a 1927 case where the litigants did not argue the points argued in this present case, Second Circuit Judge Learned Hand teaches:

> If it is important, I suggest that the language of the (Sixteenth) Amendment itself gives Congress power to lay "taxes on incomes", NOT ON PERSONS. (Emphasis added). *Bowers v. Taft*, 20 F.2d 561 at 564 (1927).

And in that same case, this Supreme Court also teaches:

> Income is the thing which may be taxed – income from any source. The Amendment does not attempt to define income or to designate how taxes may be laid thereon, or how they may be enforced. *Taft v. Bowers*, 278 U.S. 470 at 481 (1929).

This Supreme Court also teaches in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, at 582 (1895):

> Nothing can be clearer than what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing PERSONS and property within any State through a majority made up from the other States.

It is conceded by all that Congress has no power granted it by our Constitution to tax PERSONS and that Congress has not enacted any law in Subtitle A making any imposition on PERSONS. Neither respondent nor the judges of the Fourth Circuit could find any such imposition; everyone concedes there is no such imposition in Subtitle A on PERSONS.

The tax liability asserted against the Espositos in this case by the Commissioner is based on a *pretense* the Constitution empowers Congress to tax PERSONS and the additional *pretense* that the Code imposes a Subtitle A liability for tax on PERSONS. Pretense, however, cannot replace actuality. The Constitution guards against directly taxing PERSONS (*Pollock*, supra) and the Code makes no impositions on PERSONS; this is now conceded by all. The decisions below should be reversed summarily; the Constitution does not permit directly taxing PERSONS and there is no Subtitle A imposition on PERSONS.

E. *It Is Conceded By All That Congress Has Not Exercised Any Of Its Constitutional Powers In Subtitle A Of The Code.*

While Congress has Constitutional power to lay and collect Taxes, Duties, Imposts and Excises (including those on incomes), Congress has not exercised any of such Constitutional powers in Subtitle A of the Code.

In the matter of taxation, there are no other possibilities or classifications. Of all the powers granted to Congress by our Constitution, Congress has not exercised in Subtitle A any of the Constitutional powers granted it. *There is no Constitutional foundation whatever for Subtitle A or its provisions.* This is also conceded by all.

CONCLUSION

For the foregoing reasons, this petition should be granted and a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

THOMAS J. CARLEY
Counsel for Petitioners
159 Princeton Road
Rockville Centre, New York 11570
Telephone: (516) 766-2489

APPENDIX

APPENDIX A

United States Court of Appeals

for the

Fourth Circuit

No. 85-1418

DOUGLAS ESPOSITO and BARBARA P. ESPOSITO,

Appellants,

— vs. —

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPEAL FROM THE UNITED STATES TAX COURT
Judge Edna G. Parker, Tax Court Judge
(Tax Ct. No. 7495-83)

Submitted: December 23, 1985 Decided: April 11, 1986

Before CHAPMAN, WIDENER and HALL, Circuit Judges.

(Thomas J. Carley, on Brief) for Appellants.
(Glenn L. Archer, Jr.; Michael L. Paup, David English Carmack, Michael J. Roach, on brief) for appellee.

PER CURIAM:

Douglas and Barbara P. Esposito appeal from the judgment of the United States Tax Court dismissing their case for lack of prosecution and sustaining the deficiency and additions to tax determined by the Commissioner of Internal Revenue. Finding no abuse of discretion on the part of the Tax Court, we affirm.

I.

The Espositos jointly filed a late Form 1040 federal income tax return for 1980 indicating income of $17,468.00 and $35,859.00 in Schedule C business expenses. The Commissioner disallowed these expenses for lack of substantiation and sent the Espositos a notice advising them of the following deficiencies and additions to tax:

Increase in tax	$12,713.23
Additions to tax: 26 U.S.C. §6651(a)(1)	1,169.69
Additions to tax: 26 U.S.C. §6653(a)	722.41

Thereafter, the Espositos timely filed a pro se petition for redetermination in which they raised the following arguments: (1) that none of the $48,731.12 in compensation received by Douglas Esposito was in the form of gold or silver coin; (2) that they received no income in 1980; (3) that the $35,859.00 claimed as Schedule C business expenses should have been allowed; (4) that they were entitled to $37,100.00 in previously unclaimed deductions; and (5) that Congress had no authority to impose a tax on income. The Commissioner filed an answer and requested the Tax Court to designate Winston-Salem, North Carolina as the place for trial. On September 4, 1984, the Tax Court sent a notice to the Espositos' Pineville, North Carolina address stating that the trial would be held in Winston-Salem

on November 26, 1984. On September 12, 1984, the Tax Court sent a second notice to the Espositos in Oldsmar, Florida.[1]

On October 9, 1984, the Espositos moved for a continuance and for a change in the place of trial. The Commissioner objected to the motion because it was untimely filed after notice indicating the time of trial had been issued. *See* Tax Court Rule 140(c). The Tax Court did not act on the motion, and the Espositos' case remained on the calendar. The Commissioner cautioned the Espositos that their motion had not been acted upon and that they should appear at the trial in Winston-Salem on November 26, 1984. Nonetheless, the Espositos failed to appear, and the Commissioner moved for dismissal. The motion was granted from the bench, but the Commissioner's request for damages was denied.

In an order entered on December 20, 1984, the Tax Court dismissed the Espositos' case and found them liable for the amounts determined by the Commissioner. Thereafter, the Espositos filed a timely motion to vacate or revise pursuant to Tax Court Rule 162. In denying this motion, the Tax Court advised the Espositos that their arguments were frivolous and quoted the following from the trial transcript:

> [S]ince the taxpayers are not here, and they are not going to be taking up any more of the Court's time and respondent's time, I any going to give them a break, and I am not going to impose damages, even though I think it is well warranted; but, certainly, I hope the taxpayers are warned and advised that if they make any such frivolous argument before this Court in the future, I would expect any presiding judge of this Court to impose damages; and I can assure the Espositos that if I am that judge, I will indeed impose damages for the full amount of $5,000.

Despite this warning, the Espositos appealed.

---

[1] The Pineville, North Carolina address was that stated on the Espositos' petition for redetermination. Apparently, the Espositos moved to Florida sometime after filing their petition; however, they failed to notify the Tax Court or the Commissioner of their change in address.

II.

On appeal, the Espositos are represented by an attorney who has prepared a brief arguing that the federal income tax is unconstitutional. The brief raises thirteen questions which counsel maintains have never been answered by an article III court. Counsel urges this Court to set forth each question verbatim in our opinion, answer each specific question, and reverse the Tax Court's judgment upon a holding that Subtitle A of the Internal Revenue Code is unconstitutional. We decline to do so.

Despite the arguments briefed by the Espositos' attorney, the sole issue on this appeal is the correctness of the Tax Court's order dismissing the suit and entering judgment against the Espositos. The Tax Court had the authority under Tax Court Rule 123(b) to dismiss the case for lack of prosecution. *See Lamb v. Commissioner*, 733 F.2d 86, *modified*, 744 F.2d 1448 (10th Cir. 1984); *Steinbrecher v. Commissioner*, 712 F.2d 195 (5th Cir. 1983). The imposition of this order of dismissal must be sustained on appeal unless the Tax Court is shown to have abused its discretion. The Espositos have failed to address this issue, and our review of the record in light of the standards enunciated in *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974), leads us to conclude that the Tax Court did not abuse its discretion in dismissing the case and entering judgment against the Espositos. *See Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978); *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976). Accordingly, we affirm.

III.

The Commissioner makes a compelling argument for the imposition of sanctions on appeal. Courts of appeals may award an appellee just damages, including single or double costs and attorney's fees, when an appeal is frivolous. *See* 28 U.S.C. §1912; Fed.R.App.P. 38; *see also Sparrow v. Commissioner*, 748 F.2d 914, 915 (4th Cir. 1984); *Granzow v. Commissioner*, 739 F.2d 265, 269-70 (7th Cir. 1984); *Crain v. Commissioner*, 737 F.2d 1417 (5th Cir. 1984). In addition, 26 U.S.C. § 7482(c)(4) authorizes the courts of appeals "to impose damages in any case where the decision of the Tax Court is affirmed and it appears that the notice

of appeal was filed merely for delay." We think it appropriate that we exercise our discretion in this case and award sanctions against the Espositos.

This Court is, of course, sensitive to the needs of those who in good faith seek the protection of the law; however, we endorse the position taken by the Seventh Circuit when it recently stated that it could "no longer tolerate abuse of the judicial review process by irresponsible taxpayers who press stale and frivolous arguments, without hope of success on the merits, in order to delay or harass the collection of public revenues or for other nonworthy purposes." *Granzow*, 739 F.2d at 269-70. In the instant case, the Tax Court gave the Espositos fair warning that their claims were frivolous and that further arguments would support the imposition of sanctions. Nonetheless, the Espositos appealed and continued their broad-based attack on the constitutionality of the federal income tax. As the constitutionality of the federal income tax has been upheld repeatedly by this and other article III courts, we believe that the Espositos' appeal is frivolous and that it was brought in bad faith solely for the purpose of delay. Accordingly, we grant the Commissioner's request for sanctions against the Espositos.

We recognize, however, that the frivolity of this appeal is attributable in great part to the efforts of the Espositos' attorney. This Court has the authority to sanction an attorney who "multiplies the proceedings in any case unreasonably and vexatiously . . . ." 28 U.S.C. § 1927. Because of § 1927's penal nature, damages should not be assessed perfunctorily. However, a review of the brief and reply brief filed by the Espositos' attorney leads us to the conclusion that this attorney has engaged in the type of conduct that § 1927 seeks to curb.

Counsel agreed to represent the Espositos on appeal after the Tax Court stated plainly that the Espositos' claims were "utterly frivolous". Rather than addressing the issue of whether the Tax Court abused its discretion in dismissing the case below, counsel launched a full scale attack on the constitutionality of the federal

income tax.[2] Any attorney admitted to practice before this Court should have the competence to understand that such arguments are wholly without merit. This attorney, in particular, should have realized as much after having similar arguments rejected as frivolous by the Tenth, Second, and Eighth Circuits. *See Charczuk v. Commissioner*, 771 F. 2d 471 (10th Cir. 1985); *Ficalora v. Commissioner*, 751 F. 2d 85, *cert. denied*, ____ U.S. ____, 53 U.S.L.W. 3702 (Apr. 1, 1985); *Lively v. Commissioner*, 705 F.2d 1017 (8th Cir. 1983). Such conduct should not be tolerated.

Counsel has exhibited unreasonable and vexatious behavior while representing the Espositos on this appeal. In so doing, he has unnecessarily multiplied the proceedings in this Court. By imposing sanctions solely against the Espositos, we cannot guarantee that this attorney will be deterred from bringing frivolous appeals in the future on behalf of other taxpayers. Accordingly, we grant the Commissioner's request for sanctions against the Espositos' attorney.

IV.

In sum, having found no abuse of discretion on the part of the Tax Court, we dispense with oral argument and affirm the judgment below. This appeal is frivolous, and sanctions are clearly warranted; accordingly, we order the Espositos to pay double the Commissioner's costs on appeal and order the Espositos' attorney to reimburse the Commissioner for the attorneys' fees reasonably incurred while defending this appeal. The Commissioner shall have fifteen days from the date this opinion is filed to submit affidavits detailing the fees and costs expended. The Espositos and their attorney shall have fifteen days from the date

---

[2] In addition to making frivolous arguments, counsel makes a number of outrageous and offensive statements in his reply brief. Throughout this brief, counsel states that the Commissioner is lying to the Court. Counsel asserts that judges of this Court have been fooled by the "determined propagandists" who seek to enforce the federal income tax laws. Reply Brief at 2. In another section of the reply brief, counsel reasons that "[i]t is a safe maxim to believe that 'if it appears in appellee's brief, it is false and not to be relied on' by the Court unless verified by appellants." Reply Brief at 7.

the Commissioner files his affidavit to submit a response to the Commissioner's accounting. Costs and attorneys' fees shall be assessed in the first instance by the Clerk of this Court. Thereafter, either party dissatisfied by the Clerk's determination, upon written application therefor, may obtain review by the Court on the papers without oral argument.[3] *See Sparrow*, 748 F.2d at 915-16.

affirmed; sanctions imposed.

---

[3] A court that imposes sanctions on an attorney pursuant to § 1927 must "afford the attorney all appropriate protections of due process available under the law." H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2716, 2781, 2783. In *Charczuk*, the Tenth Circuit noted that any right that counsel may have had to a hearing was satisfied by allowing counsel an opportunity at oral argument to explain why sanctions should not be imposed against him. 771 F.2d at 476 n. 4. As there is no due process right to oral argument, *see* Fed.R.App.P. 34, we think that counsel's right to due process was safeguarded by the fact that he had an opportunity to respond in the reply brief to the Commissioner's request for sanctions. *Accord* Mone v. Commissioner, 774 F.2d 570, 574-75 (2d Cir. 1985); Kalgaard v. Commissioner, 764 F.2d 1322, 1324 (9th Cir. 1985); Hagerty v. Succession of Clement, 749 F.2d 217, 222-23 (5th Cir. 1984); *cert denied*, ___ U.S. ___, 54 U.S.L.W. 3307 (Nov. 5, 1985); United States v. Nesglo, Inc., 744 F.2d 887, 892 (1st Cir. 1984).

APPENDIX B

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

DOUGLAS ESPOSITO AND
BARBARA P. ESPOSITO

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 7495-83

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the Trial Session of the Court on November 26, 1984 at Winston-Salem, North Carolina. There was no appearance made by or on behalf of petitioners. Counsel for respondent orally moved to dismiss for failure by petitioners to properly prosecute. After due consideration and for cause appearing in the transcript of the proceedings, it is

ORDERED that respondent's oral motion is granted and this case is dismissed for failure by petitioners to properly prosecute. It is further

ORDERED and DECIDED that there is a deficiency in income tax, and additions to the tax due from petitioners, as set forth in the Statutory Notice of Deficiency dated January 6, 1983, upon which notice the above-entitled case is based as follows:

		Additions to the Tax	
		Sec. 6653(a)	Sec. 6651(a)(1)
Taxable Year	Deficiency	Internal Revenue Code	
1980	$12,713.23	$722.41	1,169.69

/s/ Edna G. Parker
Judge

Entered: DEC 20 1984

SERVED DEC 20 1984

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

DOUGLAS J. ESPOSITO AND
BARBARA P. ESPOSITO

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 7495-83

ORDER

The Court, having received a written communication from petitioners wherein they request that the trial of this case be changed from Winston-Salem, North Carolina to Tampa, Florida, it is

ORDERED that the Clerk of the Court is directed to file petitioners' communication received October 9, 1984 as Petitioners' Motion for Continuance and to Change Place of Trial. It is further

ORDERED that respondent shall, on or before November 6, 1984, file a written response thereto. The Court will thereupon take such further action as is appropriate in regard to petitioners' motion.

/s/ Howard A. Dawson, Jr.
Chief Judge

Dated: Washington, D.C.
October 15, 1984

SERVED OCT 16 1984

APPENDIX D

PETITIONERS' TAX COURT PETITION ALLEGATIONS WHICH HAVE BEEN ADMITTED BY RESPONDENT IN HIS TAX COURT ANSWER IN THIS CASE.

5.n. On their 1980 income tax return filed, petitioners declared their gross income to be $17,468.00.

5.o. On their 1980 income tax return filed, petitioners claimed no adjustments to income and declared their adjusted gross income to be $17,468.00

5.e. Respondent disallowed various amounts aggregating $35,859.00 as not deductible from gross income.

5.u. On their 1980 income tax return filed, petitioners did not itemize deductions.

5.a. A penalty under Section 6651(a)(1) cannot be imposed where there is no underpayment of income tax.

5.b. A penalty under Section 6653(a) cannot be imposed where there is no underpayment of income tax.

APPENDIX E

Questions Presented to the United States Court of Appeals for the Fourth Circuit On Appeal from the Decision of the United States Tax Court

1. Does Subtitle A of the Internal Revenue Code, as amended, (26 United States Code) (26 U.S.C.) ("Code") impose any TAX ("direct" in the Constitutional sense) subject to and complying with the Constitutional requirements and limitations contained in Art. I, Sec. 2, cl. 3 and/or Art. I, Sec. 9, cl. 4 of our Constitution that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers" and that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"?

and, if there are any such impositions of Tax, which words of Subtitle A make each such imposition?

2. Does Subtitle A of the Code impose any EXCISE (an "indirect" tax in the Constitutional sense) subject to and complying with the Constitutional requirements and limitations contained in Art. I, Sec. 8, cl. 1 of our Constitution that "Excises shall be uniform throughout the United States"?

and, if there are any such impositions of Excise, which words of Subtitle A make each such imposition?

3. Does Subtitle A of the Code make any imposition on INCOME (an "Excise"– an "indirect" tax in the Constitutional sense) subject to and complying with the Constitutional requirements and limitations contained in the Sixteenth Amendment of our Constitution that "Congress shall have power to lay and collect taxes on incomes . . ." and in Art. I, Sec. 8, cl. 1 of our Constitution that "Excises shall be uniform throughout the United States"?

and, if there are any such impositions on "income", which words of Subtitle A make each such imposition?

4. Is there any power or authority granted by the Constitution to Congress to impose on the individual human persons who are the appellants herein a tax for the "Taxable Year 1980" or additions to "tax due from petitioners" and, if such power or authority exists, which words of the Constitution grant such power or authority to Congress?

5. Are there any laws or statutes enacted by Congress imposing on the individual human persons who are the appellants herein a tax for the "Taxable Year 1980" or additions to "tax due from petitioners" or liability-for-payment of a tax for the "Taxable Year 1980" or additions to tax and, if such laws or statutes exist, what is the citation and wording of such laws or statutes?

6. Is Code Section 1 unconstitutional because that Code Section violates Article I, Section 8, clause 1 of the Constitution, which requires that "Excises shall be uniform throughout the United States", based on the fact that Code Section 1 imposes an excise on "taxable income" and the additional fact that the concept or term "Taxable Income" is vague and indefinite because the underlying term "income" is undefined and unmeasureable—and if Code Section 1 is not unconstitutional on that account:

a. What is the precise definition of "income" as that term is used in taxing statutes?; and

b. Precisely how is "income" measured objectively for purposes of taxation?

7. Is Subtitle A of the Code unconstitutional because that Subtitle violates Article I, Section 8, clause 1 of the Constitution of the United States?

8. Is Subtitle A of the Code unconstitutional because that Subtitle violates Article I, Section 2, clause 3 and/or Article I, Section 9, clause 4 of the Constitution of the United States?

9. Is Subtitle A of the Internal Revenue Code unconstitutional because that Subtitle violates the Sixteenth Amendment to the Constitution of the United States?

10. Is Subtitle A of the Code unconstitutional because it violates Article I, Section 8, clause 1 and/or Article I, Section 2, clause 3 and/or Article I, Section 9, clause 4 and/or the Sixteenth Amendment of the Constitution of the United States?

11. When no deductions from "gross income" have been claimed by appellants, may the appellee legitimately and Constitutionally disallow $35,859.00 of unclaimed deductions as "not deductible from gross income" and thus assert that appellants owe and must pay tax directly to the Federal government?

12. Does Congress have any power granted it by the Constitution to directly tax appellants who are individual human persons and, if such power exists, which words of the Constitution grant such power to Congress?

13. Is Subtitle A of the Code unconstitutional because all impositions contained in subtitle A are on concepts which are undefined, unmeasureable, vague and indefinite?